

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB 7/21/99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Georgia Bariatrics, P.C.  
v.  
Vitamin Logic, Inc.

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Opposition No. 103,579 to application Serial No. 75/029,389  
filed on December 7, 1995

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Laurence P. Colton and Bradley K. Groff of Deveau, Colton &  
Marquis for Georgia Bariatrics, P.C.

James M. Graziano of Duft, Graziano & Forest, P.C. for Vitamin  
Logic, Inc.

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Before Cissel, Hohein and Bucher, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

An application has been filed by Vitamin Logic, Inc. to  
register the mark "VITAMIN LOGIC" for "vitamin preparations".<sup>1</sup>

Registration has been opposed by Georgia Bariatrics,  
P.C. on the ground that opposer "is and for many years has been  
in the business of selling health supplements including vitamin,

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<sup>1</sup> Ser. No. 75/029,389, filed on December 7, 1995, which alleges a bona  
fide intention to use the mark in commerce. The word "VITAMIN" is  
disclaimed.

mineral and herbal preparations"; that since at least as early as 1992, opposer has used the mark "VITALOGIC" in connection with such goods; and that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used mark as to be likely to cause confusion, mistake or deception.<sup>2</sup>

Applicant, in its answer, has denied the salient allegations of the opposition.<sup>3</sup>

The record includes the pleadings; the file of the opposed application; and, as part of opposer's case-in-chief, the testimony, with exhibits, of Jan McBarron, M.D., who is the president and co-owner of opposer. As the rest of its case-in-chief, opposer has submitted notices of reliance<sup>4</sup> upon, among other things,<sup>5</sup> a copy of its application, Ser. No. 75/177,151, to register the mark "VITA LOGIC" for "natural health supplements,

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<sup>2</sup> Although opposer also alleges that "the registration by Applicant of its mark will falsely suggest a connection with Opposer," such allegation will not be given further consideration inasmuch as it was neither pursued at trial nor argued in the briefs.

<sup>3</sup> While applicant additionally alleges, as a nominal affirmative defense, that opposer, "by failing to pursue registration of Opposer's mark in a timely manner, is guilty of laches and has prejudiced Applicant, who has expended significant resources in placing the mark VITAMIN LOGIC in actual use," such defense was neither tried nor raised in the briefs. Accordingly, no further consideration will be given to applicant's putative affirmative defense of laches.

<sup>4</sup> The parties' joint stipulation, received on June 22, 1998, to submit evidence--including the filing of any notices of reliance--"outside of each party's Principal Testimony period" is approved.

<sup>5</sup> While opposer also states that it relies upon its first set of interrogatories to applicant and applicant's answers thereto, copies of such documents apparently were not furnished; instead, the Board received a copy of applicant's first set of discovery requests to opposer.

namely, natural vitamin, mineral and herbal preparations".<sup>6</sup> Applicant, as its case-in-chief, took the testimony, with exhibits, of Suzanne Maisch, who is applicant's director of operations and secretary. Briefs have been filed,<sup>7</sup> but an oral hearing was not requested.

The issues to be determined in this case are whether opposer has established that it has priority of use of its mark<sup>8</sup> and, if so, whether contemporaneous use of the parties' marks in connection with their respective goods is likely to cause confusion as to source or sponsorship.

According to the record, opposer was started in August 1987 as the medical practice of Dr. Jan McBarron, a physician

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<sup>6</sup> The remaining items upon which opposer relies, although not proper subject matter for a notice of reliance, are in any event surplusage inasmuch as they constitute duplicate copies of evidence which otherwise forms part of the record in this proceeding.

<sup>7</sup> Although opposer, in its main brief, raises the additional issue that the application opposed is barred by applicant's intentional misuse of the registration notice, such issue was neither pleaded nor tried by the express or implied consent of the parties. Accordingly, no further consideration will be given thereto. Similarly, applicant in its brief sets forth the nonsensical statement that it "believes that Applicant's mark VITAMIN LOGIC is not confusingly similar to Opposer's mark VITA LOGIC and Applicant believes that it is the senior user of the mark VITAMIN LOGIC and that it is legally identical to Opposer's mark VITA LOGIC used in connection with legally identical goods and, thus, Opposer's application should be rejected." The basis for such rejection, applicant explains, is that "if it is determined that the mark ... was not used [by opposer] at the time Opposer's application was filed, Opposer's application must be held void ab initio ...." However, inasmuch as opposer's application to register its mark is not before the Board in this proceeding, no further consideration will be given to such claim.

<sup>8</sup> While opposer, as noted previously, pleaded ownership of the mark "VITALOGIC," the evidence presented by opposer at trial shows use of the mark "VITA LOGIC" instead. Nevertheless, inasmuch as there is no question that the latter, for all practical purposes, is the legal equivalent of the former, we have adopted the practice of the parties in their briefs and will refer to opposer's mark in the remainder of this opinion as "VITA LOGIC," since such two-word term projects the same continuing commercial impression as the single term "VITALOGIC".

whose principal area of expertise is "[b]ariatric medicine, which is the medical specialty of obesity." (McBarron dep. at 76.) Dr. McBarron is the president of opposer and is the co-owner thereof along with her husband, Joseph "Duke" Liberatore. In conjunction with the patient treatment programs prescribed by Dr. McBarron, opposer markets various vitamins, herbs and supplements under the mark "VITA LOGIC" and has done so since at least as early as the summer of 1994.

Dr. McBarron and her husband also own three other business. One of those, Peachtree Natural Foods, is a retail "natural foods store" which opened the first of its eight locations in October 1991 and primarily sells vitamin and herbal supplements, including opposer's "VITA LOGIC" products. (Id. at 8.) A second company, The Institute For Healthy Living, is a mail-order retailer and wholesaler which was started in August 1992 and sells vitamins, herbs and supplements, including opposer's "VITA LOGIC" products, to consumers and to natural food or health food stores. In addition, The Institute For Healthy Living acts as the supplier of "VITA LOGIC" vitamins, herbs and supplements for both opposer and Peachtree Natural Foods stores. A third business is a nationally syndicated weekly radio show on health issues, known as "The Duke And The Doctor," which began around February or March 1993. Such show, of which a television version is done twice weekly, airs five times a week and features a listener call-in format. The show also advertises and offers opposer's "VITA LOGIC" vitamins, herbs and supplements. Thus, according to Dr. McBarron, opposer's "Vita Logic [brand of goods]

is sold through ... Duke And The Doctor, ... the Institute For Healthy Living and all the [Peachtree Natural Foods] stores as well as through my private practice." (Id. at 15.)

Dr. McBarron also testified that "our line of [VITA LOGIC] vitamin[s] is sold in health food stores all across the country because the institute sells wholesale to health food stores." (Id. at 17.) Opposer, however, does not produce any of its products. Instead, through The Institute For Healthy Living, whose name appears on labels for the goods, opposer has a manufacturing company make and package its vitamins, herbs and supplements. Depending on the amount of product, opposer's "VITA LOGIC" goods range in price from \$6.95 to \$90.00 a bottle. Gross revenue for such goods amounted to \$175,816.00 for the first half of 1997, \$329,860.00 for 1996 and \$89,991.00 for 1995, respectively representing unit sales of 11,271, 21,991 and 5,999 bottles. While, in particular, opposer derives the predominant portion of its revenue from Dr. McBarron's fees as a physician, she estimated that about 15 percent of opposer's revenue is from sales of "VITA LOGIC" products. Sales thereof produce better than 50 percent of the revenue generated by Peachtree Natural Foods stores and account for 60 to 70 percent of the revenue earned by The Institute For Healthy Living.

Opposer's products were first advertised at least as early as the summer of 1994. Such products are advertised in mail-order catalogs distributed by The Institute For Healthy Living and in monthly newsletters disseminated as flyers and bag-stuffers by Peachtree Natural Foods stores. The latter company,

along with opposer, also does local newspaper, print, radio and television advertising for the "VITA LOGIC" goods. In addition, such goods are promoted on The Duke And The Doctor show, which on occasion broadcasts live from Peachtree Natural Foods and other health food stores. During the first six months of 1997, opposer spent \$116,752.00 on advertising its "VITA LOGIC" products and expended \$205,933.00 and \$114,419.00 thereon in, respectively, 1996 and 1995. Other sources of advertising include radio, television and print ads run by various health food stores which carry such products.

Dr. McBarron first heard of applicant's "VITAMIN LOGIC" vitamin preparations in late 1996 when, while doing her program, she "had a caller on the radio ask if Vitamin Logic was the Vita Logic we talk about." (Id. at 64.) According to Dr. McBarron, she has experienced about a dozen of such incidents, some of which have been in the form of letters to her radio show from persons who were unable to get their inquiries on the air. These inquiries, she testified, have been "sprinkled out" over time, although she could not recall whether any of the letters were retained. (Id. at 65.)

Applicant, like opposer, sells a full line of vitamin preparations and herbal supplements. Applicant, which was incorporated sometime in 1996, markets such products under the mark "VITAMIN LOGIC" and has continuously done so, according to Ms. Maisch's knowledge, since the date of its incorporation. Applicant's line of "VITAMIN LOGIC" products includes "commodity" items such as vitamin C, which are offered by virtually every

company which sells vitamin preparations and supplements, as well as its exclusive "propriety formulations" of nutritional supplements. (Maisch dep. at 9.)

Like opposer, the manufacturing of applicant's goods is "contracted out" in that applicant has another company produce and label its "VITAMIN LOGIC" products. However, unlike opposer, applicant's goods are not sold to wholesalers and thus are not sold, for example, by physicians who would prescribe such products. Instead, applicant's goods are sold only by mail order and at retail through both "Great Earth" vitamin stores, which also sell opposer's "VITA LOGIC" products,<sup>9</sup> and applicant's own "Vitamin Logic" health food stores. As of the deposition date of its witness, applicant operated five of its "Vitamin Logic" health food stores and had franchised two others. Sales of applicant's "VITAMIN LOGIC" vitamin preparations for 1997, the only year for which sales figures were provided, were stated to be \$500,000.00.

Applicant advertises its "VITAMIN LOGIC" goods in a variety of ways, but many of its printed ads and most of its promotional materials reflect the theme that such products, as stated on its letterhead stationery, are "Premium Quality, Doctor Designed, Laboratory Tested". (Applicant's exhibit 15.) In

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<sup>9</sup> Specifically, when asked if she had "ever heard of Great Earth" vitamin stores, Dr. McBarron replied that "we have a customer called Great Earth" and further testified as follows:

Q. And do you sell Vita Logic products to them?

A. Yes.

(McBarron dep. at 71.)

particular, as to the role apparently played by doctors in the development and marketing of applicant's goods, the packet of materials it distributes to prospective franchisees indicates that "A team of health care professionals, including medical doctors, naturopathic physicians, nutritionists and biochemists[,] formulates each product"; a flyer containing coupons refers to "A Complete Doctor Designed Nutritional Program"; and a store handout, besides explaining that the phrase "'Doctor Designed' mean[s]" that applicant's "supplements are formulated by health professionals who understand the human body," states that:

The unique formulas at **VITAMIN LOGIC®** bear the label "Doctor Designed" because of the extensive research and cooperation that went into formulating them. Created by a consortium of health experts, **VITAMIN LOGIC®** formulas are the collective work of Medical and Naturopathic Physicians working in conjunction with Biochemists and Nutritionists to bring you fully balanced, high potency formulas.

(Applicant's exhibits 2, 7 and 11.)

Applicant's advertising of its "VITAMIN LOGIC" products is done in local newspapers and on the radio. In addition, prospective customers visiting its retail stores receive a free three-day supply of one of applicant's vitamin and mineral supplements. Applicant, since at least the beginning of 1996, also sponsors a weekly call-in radio talk show, hosted by a certified nutritionist, on health and nutrition. The show, which is broadcast live from applicant's retail stores, regularly



features commentary from medical doctors and naturopathic physicians.

While Ms. Maisch indicated in her testimony that she has heard of the name "VITA LOGIC," she also testified that, to the best of her knowledge, none of applicant's customers who have purchased its "VITAMIN LOGIC" products by mail order or through its retail stores have ever inquired about opposer's "VITA LOGIC" goods. Ms. Maisch also testified to authorizing a trademark search report, which was prepared by a commercial firm after the filing of both applicant's and opposer's applications to register their respective marks, which lists a total of 116 instances in which the word "LOGIC" (or derivatives thereof) is used as a formative for marks for vitamins or nutritional supplements. However, other than the parties' marks, the record contains no evidence that any of such marks has been or is currently in actual use, nor are any of the third-party marks listed in the search report substantially similar to either of the parties' marks.

Turning first to the issue of priority, we note that if opposer does not have rights in its mark which are equal or superior to those of applicant, it simply cannot prevail in this proceeding. We find, however, that opposer does have priority inasmuch as its first use of the mark "VITA LOGIC" for vitamins, minerals and herbal preparations occurred in September 1994. By contrast, not only did applicant's first use of the mark "VITAMIN LOGIC" for vitamin preparations not take place until sometime in 1996, but the earliest date upon which it can rely in this

proceeding, namely, the December 5, 1995 filing date of its involved application,<sup>10</sup> is obviously subsequent to opposer's date of first use. Applicant asserts, however, that opposer "has failed to produce any evidence of any use of the mark VITA LOGIC in the name of Georgia Bariatrics, P.C." and that, instead, the "exhibits of use of the mark VITA LOGIC produced in the evidence collected in this proceeding are all in the name of [The] Institute [F]or Healthy Living."

It is our view, however, that the testimony and exhibits introduced by Dr. McBarron are sufficient to establish opposer's September 1994 date of first use of the VITA LOGIC mark for vitamin, mineral and herbal supplements. The exhibits, which variously show that such products have been labeled as being "Formulated For: Institute of Healthy Living" and that they have been advertised by Peachtree Natural Foods and The Institute For Healthy Living, are not inconsistent with Dr. McBarron's testimony that opposer is the owner of the "VITA LOGIC" mark. Such companies, which like opposer are co-owned by Dr. McBarron and her husband (who also constitute the sole corporate officers thereof), are on this record merely dealers which buy and resell the branded merchandise, but such activity does not vest therein any ownership rights in the mark for the goods they distribute.<sup>11</sup>

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<sup>10</sup> See *Zirco Corp. v. American Tel. & Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991).

<sup>11</sup> See 2 J. McCarthy, *McCarthy on Trademarks & Unfair Competition* §16:48 (4th ed. 1999) at page 16-66. Similarly, we also note that approximately half of the labels for applicant's "VITAMIN LOGIC" products, which were introduced as exhibit 1 to the deposition of Ms. Maisch, contain no reference to applicant and, instead, simply bear the legend "Distributed by Alpine Naturals".

Furthermore, according to Dr. McBarron, while she does not have any invoices from Marlyn Nutraceuticals, which formerly served as the manufacturing company for "VITA LOGIC" products, from before April 1995 or have any records from 1994 due to "some internal problems," she also testified on cross-examination that she and her husband "make all the decisions" for the companies which they co-own and that "we have set it up so that The Institute For Healthy Living is the one who deals with the manufacturer" so that opposer, "Georgia Bariatrics[,] remains exclusively for patient care, so to speak." (McBarron dep. at, respectively, 91 and 82.)

This brings us, therefore, to consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for determining whether a likelihood of confusion exists. To begin with, we note among other things that, as identified in its application, applicant's "vitamin preparations" are legally identical to opposer's various health supplements, including vitamin, mineral and herbal preparations. As applicant concedes in its brief, "[i]t is undisputed that Applicant's goods and Opposer's goods are closely related and, in some cases, virtually identical."

Applicant nevertheless argues that, "while Applicant's goods and Opposer's goods are closely related or in many cases identical, the unique nature of the vitamin and dietary supplement business renders the proprietary products and the

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customer service delivered along with the vitamin and dietary supplement products the determining factor in the customer's identification of the source of vitamin and dietary supplements." Applicant's argument, however, ignores the fact that, as set forth in its application, its "vitamin preparations" encompass what applicant has characterized as "commodity items that are offered by virtually every supplier" in the vitamin and dietary supplement field, including the commodity products sold by opposer. It is settled, in this regard, that the registrability of applicant's mark must be evaluated on the basis of the identification of goods set forth in its involved application, notwithstanding what the record may reveal as to the particular nature of applicant's goods, their actual channels of trade or manners of distribution, or the classes of purchasers to which they are in fact sold. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987). Moreover, even as to the so-call proprietary products, opposer's witness indicated that opposer offers proprietary products which are similar to those sold applicant, although the formulas therefor are not identical. In particular, upon reviewing a mail-order form and price list for applicant's "VTAMIN LOGIC" products, Dr. McBarron testified that she did not "see any product on here that there's not a comparable one in the Vita Logic line." (Id. at 68.)

It is clear, therefore, that as legally identical products, applicant's vitamin preparations and opposer's vitamin, mineral and herbal dietary supplements would be sold through the same channels of trade to the same classes of customers. In fact, the record confirms that such is the case in that the parties, for example, sell their goods to ordinary consumers by mail order and through health food and/or natural food stores. Both parties also market their vitamins and dietary supplements to the general public in identical manners and tout their goods as doctor designed or recommended. Specifically, as applicant concedes in its brief, "it is a case of *deja vu* since both use a radio talk show, personal appearances, newspaper inserts, newsletter, newspaper advertisements, coupons, and the like to promote their respective goods." There simply is no doubt, therefore, that if the parties' vitamin preparations were to be sold under the same or substantially similar marks, confusion as to the source or sponsorship thereof would be likely to occur.

While we disagree with opposer's assertion in its main brief that the parties' marks are "legally identical," we find that when considered in their entirety, applicant's "VITAMIN LOGIC" mark is substantially similar in sound, appearance and connotation to opposer's "VITA LOGIC" mark. Most importantly, when used in connection with dietary supplements and other vitamin preparations, the respective marks project essentially the same overall commercial impression.

In view thereof, and irrespective of any instances of actual confusion as asserted by opposer,<sup>12</sup> we conclude that consumers familiar with opposer's "VITA LOGIC" mark for its various health supplements, including vitamin, mineral and herbal preparations, would be likely to believe, upon encountering applicant's substantially similar "VITAMIN LOGIC" mark for its vitamin preparations, that such goods (which are identical for all practical purposes) emanate from, or are otherwise sponsored by or affiliated with, the same source.

**Decision:** The opposition is sustained and registration to applicant is refused.

R. F. Cissel

G. D. Hohein

D. E. Bucher  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board

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<sup>12</sup> As to opposer's contention that the record reveals several instances of actual confusion between the parties' marks, we are constrained to agree with applicant that the single incident testified to by Dr. McBarron, in which a caller to The Duke And The Doctor radio program inquired as to whether "VITAMIN LOGIC" products were the "VITA LOGIC" products talked about on the show, tends to show that the particular caller was able to distinguish the goods, based upon the marks, rather than being actually confused. Dr. McBarron's undocumented reports of several other allegedly similar incidents of actual confusion must be considered, in the absence of further details, as simply de minimis. In addition, the fact remains that, with the exception of a single retail outlet ("Great Earth" vitamin stores) shared by the parties, circumstances have not been shown to be such that if confusion were likely, it could be expected to have taken place. Accordingly, whether there have been any incidents of actual confusion is not a meaningful factor in this case.